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No. 89-1647

In The

Supreme Court of the United States

October Term, 1990

CARNIVAL CRUISE LINES, INC.,

Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Was the Ninth Circuit Court of Appeals correct in finding that the Petitioner's contacts within the State of Washington and Petitioner's efforts directed at the residents of the State of Washington were sufficient for the constitutional exercise of the Washington Long Arm Statute?

2. Is the forum selection clause printed on a steamship passenger ticket enforceable in the factual context of this case?

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STATEMENT OF THE CASE

This case arises from a personal injury in 1986 to Eulala Shute while she and her husband were passengers on a vessel owned by the Respondents, the M/V TROPICALE. Her injury occurred while the vessel was in international waters on a cruise which began and ended in the State of California. J.A. 11. Mrs. Shute was injured when she fell during a conducted tour of the ship's galley. J.A. 11. This action was filed in the United States District

Court for the Western District of Washington, in Admiralty, pursuant to 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. J.A. 4.

The Respondents are residents of the State of Washington and purchased their tickets in the State of Washington from a local travel agency. Res. App. 1. Petitioner required that passengers tender payment to the travel agent prior to receiving their ticket and Petitioner's form ticket was delivered to Respondents, in Washington, by the travel agent. Res. App. 1. The travel agent involved, Lynn Weber, had received promotional material from the Petitioner and had also been trained at seminars conducted by Petitioner within the State of Washington. The travel agent received a ten percent commission for the sale of the ticket package. Res. App. 2. Mrs. Shute received promotional materials prepared by Petitioner from the travel agent. J.A. 11.

Petitioner advertises both nationally and locally in Washington in addition to its seminars and other promotional activities. Res. App. 2. Petitioner admits it receives a portion of its revenues from Washington residents as a result of these promotional and sales activities. See Pet. App. 2a. These sales, 1.29 percent in 1985 and 1.06 percent in 1986, were roughly proportional to the population of Washington. In 1987, Washington's population was approximately 1.7 percent of the population of the United States in 1987. (*1988 World Almanac and Book of Facts*, 588, 732). Petitioner's commercial presence within Washington consisted of the sales of its product in Washington, the purchase of the services of Washington travel agents, promotional seminars within Washington and Petitioner's advertising campaign.

The vessel M/V TROPICALE was operating from California ports at the time this action was commenced. All the witnesses to the accident are either on the vessel, residents of California or residents of Washington, including Respondent's physicians. J.A. 12. The only connection to the State of Florida is that Petitioner, a Panamanian corporation, currently maintains its headquarters in that state. It is unlikely that any person in the corporate headquarters would have information relevant to Respondents' personal injury lawsuit. Respondents contend that it would be much more difficult to recover compensation for their injuries if suit were to be brought in Florida.

The case was initially dismissed by the Honorable Carolyn Dimmick for want of jurisdiction. See Pet. App. 60a-65a. This decision was reversed by the Ninth Circuit Court of Appeals. Their decision, published at 863 F.2d, 1437, is reproduced in Petitioner's Appendix pages 25a-48a. This decision was withdrawn in order to allow the Washington State Supreme Court to answer a question regarding the scope of the Washington State Long Arm Statute, Washington Revised Code § 4.28.185. The Supreme Court's opinion is reproduced in the Petitioner's Appendix.

In that decision, the Washington State Supreme Court affirmed that the "but for" requirement articulated by the circuit court was a correct interpretation of the Washington Long Arm Statute, which requires that the action "arise out of" the transaction of business in the state. See: Washington Revised Code § 4.28.185. The Washington Supreme Court specifically found that the activities of Carnival within the State of Washington, and directed at

the residents of the state of Washington, were sufficient for the constitutional exercise of the Washington State Long Arm Statute. Based upon this decision, which is recorded at 113 Wash. 2d 763, and reproduced in the Petitioner's Appendix, the Court of Appeals reissued its earlier decision. That decision is recorded at 897 F.2d 377 and is reproduced in Petitioner's Appendix.

The Ninth Circuit Court of Appeals also found that the forum selection clause in the passenger ticket was unenforceable as a matter of public policy. The ticket clause in question is one of 25 paragraphs, contained in three pages of very fine print, and attached to the back of the ticket. J.A. 15. The passenger receives the ticket only after payment is made and there is no opportunity to negotiate this, or any other, portion of the ticket. See: J.A. 12. Petitioner admits this to be the case at page 27 of their brief. This portion of the ticket also provides, at paragraph 16, that there are no refunds for unused tickets. It also contains a general exculpatory clause at paragraph 4, which purports to avoid liability for any injury caused by the negligence of the carrier or its employees. Finally, the ticket incorporates several statutes, at paragraph 24, but does not incorporate 46 U.S.C. § 183c. J.A. 15.

The basis of the circuit court's decision was that the clause was not freely bargained for and that enforcement of this clause would effectively deprive Respondents of their day in court, thereby decreasing their right to recover for personal injuries on the vessel. Pet. App. 47a-48a. The Circuit Court did not reach the issue of whether the forum selection clause was unenforceable as a matter of law because of the operation of a federal statute, the Limitation of Liability Act, 46 U.S.C. 183c,

which prohibits ticket clauses which reduce the liability of vessel owners for injuries to passengers.

SUMMARY OF ARGUMENT

1. The exercise of jurisdiction over the Petitioner is consistent with due process and does not offend traditional concepts of fair play and reasonableness. Petitioner has substantial contacts with the state and, by systematically transacting and soliciting business there, it has purposefully availed itself of the benefits of the state for its own economic gain. These contacts are sufficient to confer jurisdiction over Petitioner. Petitioner now asks the Court to impose a new requirement on litigants, that the claim have "substantive relevance" to the activities creating purposeful availment. The prior cases of this Court contain no such requirement, nor does it relate in a logical way to the prior holdings of the Court. If it is reasonable to allow suit against a foreign corporation because of its contacts within the forum, or directed at the forum, the subject matter of the lawsuit should not be required to be identical in nature to the defendant's contacts. While the decisions of this Court do discuss a substantial nexus between the defendant and the forum state, this nexus is satisfied by a sufficient number of purposeful minimum contacts. None of the Court's previous cases require a substantial nexus between the type of contact and the type of injury upon which the suit is based. If this new requirement is adopted, the Court is not only greatly restricting the rights of plaintiffs such as the Respondents, but it is opening the door to endless litigation about the "quality" of claims. A better result is to allow

the courts below to continue to use the standards already established by the Court.

The Washington Supreme Court has determined that the activities of Petitioner within Washington and directed at Washington meet the requirements of the Washington Long Arm Statute. Since that court is the final arbiter of the meaning of Washington statutes, the only remaining question for this Court is the issue of due process. This question is not decided in a vacuum, but in light of modern commercial practice and the state of modern technology. It is not difficult for a corporation such as petitioner to do substantial business in a state without being physically present therein. It is also not unfair to require them to appear and defend a suit which arises out of their successful efforts to make a profit. The "but for" test is simply another way of requiring the action arises out of Petitioner's commercial presence within the state. The same tests of reasonableness and traditional notions of fair play that are currently in use govern the application of a "but for" test.

2. The forum selection clause found in Petitioner's ticket is unenforceable both as a matter of public policy and pursuant to the operation of a federal statute, The Limitation of Liability Act, 46 U.S.C. § 183c. The forum selection clause is designed to thwart injured passengers from bringing suit to recover compensation for their injuries. In the case in which a vessel is located on the west coast of the United States and in which tickets are sold to residents of the west coast, there is no logical basis for a Florida forum. Washington is a logical forum for all parties, since the Respondents and most of the witnesses reside in that state or in nearby California. The Court's

holding in *M/S BREMEN v. Zapata Offshore Co.*, 407 U.S. 1 (1972), which concerned a commercial towing contract between parties of approximately equal bargaining power, invalidates the forum selection clause in this case. The Court recognized that the forum selection clause would not be enforceable in a situation in which one party had "overweening bargaining power" or where it violated either judicial or statutory public policy. It is difficult to imagine a situation more one sided in terms of bargaining power than that presented by the contract in this case. The circuit court was correct in refusing to enforce this contract of adhesion, recognizing that the sole purpose of the clause is to deny the injured passenger his or her day in court. The Petitioner's argument that the clause should be enforced, even if it is unfair, is not well taken. The convenience of one type of business, at the expense of thousands of consumers, is not a valid reason for upholding the forum selection clause.

The Court should also find that this ticket clause violates 46 U.S.C. § 183c since it clearly does limit the right of passengers to recover for injuries received on the ship. This is a remedial statute, and therefore broadly construed to achieve the purpose Congress intended. In this case, Congress intended to prevent shipping companies from evading their obligations to injured passengers. Being broadly construed and worded broadly, the statute does not need to specifically mention forum selection clauses in order to invalidate them.

3. The adoption of an additional test for the exercise of *in personam* jurisdiction, that of "substantive relevance", will not improve judicial efficiency, rather, it will have the opposite effect. The adoption of such a doctrine would

simply provide another tool to defendants for delaying litigation, and would require appellate courts to review numerous factual situations in cases in which the defendant has clearly transacted business in the forum state. Petitioner's arguments regarding choice of law are irrelevant to this action, which is governed by federal maritime law.

ARGUMENT

I. THE DISTRICT COURT HAS *IN PERSONAM* JURISDICTION OVER PETITIONER BECAUSE ITS CONTACTS WITH WASHINGTON ARE SUFFICIENT FOR SPECIFIC JURISDICTION AND BECAUSE THE CAUSE OF ACTION ARISES OUT OF PETITIONER'S CONTACTS WITH WASHINGTON.

Washington's Long Arm Statute permits Washington courts to assert jurisdiction to the fullest extent the due process clause allows. The Washington Supreme Court has already determined that the Respondents' cause of action arises out of the transaction of business in Washington for the purpose of the Washington Long Arm Statute. The remaining issue for this Court to decide is whether Washington's assertion of *in personam* jurisdiction over Petitioner meets the requirements of the due process clause. In accord with this Court's decisions, beginning with *International Shoe v. Washington*, 336 U.S. 310 (1945), Respondents respectfully contend that Washington has *in personam* jurisdiction over Petitioner. Petitioner's substantial contacts with Washington, including the efforts directed toward the residents of the state, are

sufficient for the exercise of the District Court's jurisdiction. Respondent respectfully urges the Court to reject the proposal of Petitioner that a new requirement of "substantive relevance" be added to the existing requirements for the exercise of *in personam* jurisdiction.

A. The District Court Has Jurisdiction Over Petitioner Because The Petitioner's Contacts With Washington Are Sufficient For The Exercise Of Due Process of Law.

The modern benchmark for the measurement of *in personam* jurisdiction is the case of *International Shoe Co. v. Washington*, 336 U.S. 310 (1945). That Court ruled that jurisdiction is proper when a sufficient number of minimum contacts with the forum state exist and if the exercise of jurisdiction by the state conforms with "traditional notions of fair play and substantial justice." *Id.* at 316. If either of these elements is missing, the exercise of *in personam* jurisdiction would violate the due process clause of the U.S. Constitution.

The Court has also held that two primary interests must be considered in reaching a decision regarding due process. These are the protection of individual liberty from excessive state power and the state's right to protect its sovereignty in the context of federalism. The Court protects the individual's interest from litigation in an unrelated or inconvenient forum by requiring evidence that the defendant purposefully directed his conduct toward the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). The Court recognizes

that the States have legitimate interests in extending their jurisdiction to protect their citizens, but due process limits those interests. *World-Wide Volkswagen*, 444 U.S. at 292.[1] In this case, the petitioner's transaction of business in Washington makes it proper that jurisdiction be exercised by Washington courts. A corporation systematically and continuously transacting and soliciting business in a state should reasonably expect to be subject to the jurisdiction of that state. The interests of Washington in providing a forum for its own injured citizens to recover for their injuries is a legitimate state interest, and it far exceeds the rather nebulous interests of Florida, where the Petitioner currently maintains its corporate headquarters.

The due process policies and requirements established by the Court must be viewed in light of today's economic and technological realities. The Court has consistently rejected the notion of a bright-line rule in determining *in personam* jurisdiction: "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *International Shoe*, 326 U.S. at 319. "[T]he requirements for personal jurisdiction over

[1] The importance of federalism concerns must be viewed in light of the defendant's individual liberty interest. "By requiring clear evidence of some purposeful conduct on the part of the defendant, defendant's individual liberty interests are protected and at the same time the state appropriately will be recognizing the coequal sovereignty of its sister states." J. Friedenthal, M. Kane, A. Miller, *Civil Procedure* § 3.11 at 137.

nonresidents have evolved from the rigid rule of *Pennoyer* . . . to the flexible standard of *International Shoe*." *Hanson v. Denckla*, 357 U.S. 235, 251 (1957).

This flexible approach to *in personam* has expanded personal jurisdiction over nonresidents to keep pace with the national economy's transformation.

> Looking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.

McGee v. International Life Insurance Co., 355 U.S. 220, 222-23 (1957).

This Court noted ten years ago that the economic and technological advances stressed in *McGee* "have only accelerated in the generation since that case was decided." *World-Wide Volkswagen*, 444 U.S. at 293. And the acceleration of economic and technological changes mentioned in *World-Wide Volkswagen* have continued to quicken since that decision and must be considered in this decision. While due process is still required. *Hanson*, 357 U.S. at 251, the Court may take judicial notice of the great changes in telecommunication, travel and computer

technology that have occurred in the last ten years and the effect this has had on interstate business transactions. In *Burger King*, 471 U.S. 462, 476 (1984), the Court again confirmed that, once it is established that the defendant has purposefully established minimum contacts with the state, other factors, in light of modern technology, may be used to determine whether the exercise of jurisdiction meets the requirements of *International Shoe*.

Bearing in mind these economic and technological developments, the Court recently has broken *in personam* jurisdiction into two categories: general and specific jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). General jurisdiction requires continuous and systematic contacts with the forum state when the cause of action does not arise out of or relate to the defendant's contacts with the forum. This minimum contacts threshold for general jurisdiction is higher than for specific jurisdiction. While Respondents have always maintained that the activities of Petitioner have been sufficient for the exercise of general jurisdiction, the circuit court disagreed and decided this case on the basis of specific jurisdiction. Petitioner makes frequent reference to *Helicopteros Nacionales*, which dealt only with general jurisdiction.

The state has specific jurisdiction over the defendant when the "controversy is related to or 'arises out of' a defendant's contacts with the forum." *Id.* at 414. Specific jurisdiction requires fewer minimum contacts than does general jurisdiction. Specifically, the state may exercise specific jurisdiction over the defendant "if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged

injuries that 'arise out of or relate' to those activities." *Burger King Corp.*, 471 U.S. at 472.

In this case, the term "arise out of" has been interpreted as a matter of state law by the Washington Supreme Court. Petitioner asks the Court to restrict this term by imposing another requirement, that the nature of the contacts be identical to the nature of the injury. Petitioner uses the term, "substantive relevance" to describe the additional requirement they urge the Court to adopt. This is without any real support in the Court's previous holdings and, as a matter of policy, would lead to an undue and unfair restriction on the rights of litigants to pursue claims against foreign corporations doing business in their state.

The Court's emphasis has always been on the fairness of imposing jurisdiction on a corporation that has intentionally entered the forum state for its own economic gain. Respondents recommend that the Court retain its existing approach to the "arising out of or related to" question regarding specific jurisdiction cases and base its ruling in this case on current economic realities. The ultimate question is one of fairness to be determined on a case evaluation.

> The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. . . . The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.

Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 445 (1952).

A close reading of this Court's specific jurisdiction case does not reveal a substantive connection, to the extent suggested by Petitioner, between the cause of action and a defendant's forum contacts. To the contrary, the Court's methodology has always emphasized that the defendant must have minimum contacts with the forum. "[T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum State." *Burger King*, 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 316). Though the reasonableness of jurisdiction may lessen the minimum contacts required, minimum contacts are required before the court may consider the reasonableness of jurisdiction. *Hanson v. Denckla*, 357 U.S 235, 251, (1957); *Burger King*, 471 U.S. at 476-78. Only after ensuring that the defendant established minimum contacts by purposefully availing itself to the forum state does a court examine the nexus.

To the extent the connection between the cause of action and the defendant's contacts has been examined, courts have implicitly adopted what can be called a sliding scale approach.[2] When the defendant's contacts have not reached the general jurisdiction level, courts have not required a tight nexus between the cause of action and

[2] *See* Richman, *Review Essay*, 72 Cal. L. Rev. 1328, 1345 (1984). Mr. Richman argues that "[t]o encompass all the proper cases, they [general and specific jurisdiction] must be supplemented by a sliding scale model of defendant's forum contacts and the proximity of the connection between those contacts and the plaintiff's claims."

the contacts. Courts have required a substantial nexus between the cause of action and the contacts when the defendant has had few or only one contact with the forum state, as in *McGee*.[3] Petitioner confuses the substantial nexus between the contacts and the defendant and a proposed nexus between the type of contact and the type of claim.

Petitioner argues that the Court has always required a "substantial nexus" between the cause of action and the contacts with the forum as was found in *McGee*, 355 U.S. 220 (1957). Petitioner also argues that this holding is

[3] *McGee* is an excellent example of a case in which the Court found specific jurisdiction based on the defendant's one contact with the forum. The nonresident defendant's only contact with California was its issuance of an insurance policy and its receipt of premium payments from the insured. The California beneficiary brought suit against the defendant when it refused to pay the proceeds of the policy upon the insured's death. Concluding that the due process clause did not preclude California from having jurisdiction, the Court found that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *McGee*, 355 U.S. 220, 223 (1957).

The Court did not find a substantial nexus between the cause of action and the defendant's contacts with California, though that existed; the defendant's only contact with California was the contract upon which the beneficiary sued. Rather, it found that the defendant's contact (the contract) with California had a substantial connection with California. As if to adduce additional support for meeting the minimum contacts threshold, the court then enumerated additional California contacts based on that contract. These contacts included the delivery of the contract in California, the mailing of premiums from California, and California as the residency of the insured and beneficiary.

"implicit" in the Court's earlier decisions. Pet. Brief at 13. For example, Petitioner correctly quotes *Keeton* as finding that the "suit arose 'out of the very activity being conducted, in part,' in that state." Pet. Brief at 12 (quoting *dicta* from *Keeton v. Hustler Magazine, Inc.*, 456 U.S. 770, 779-80 (1983)). However, the Court did not require the cause of action to arise out of the very contact with the state. Instead, the Court said that "the 'fairness' of hailing a defendant into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." *Keeton*, at 775-76. The Court required only that the claim relate to those activities in the forum; it did not require substantial connection or that the nature of the claim and the nature of the contact be identical.

Similarly, the Court in *Burger King* asserted that "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475. The emphasis was not on the connection between the contacts and the cause of action but on the sufficiency of the minimum contacts and the reasonableness of jurisdiction. *Id.* at 476-78.

Though courts in specific jurisdiction cases examine "the relationship among the defendant, the forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204 (1976), the most important criterion has always been the defendant's minimum contacts with the forum state. The nexus between the cause of action and the defendant's contacts with the forum should be viewed as a constitutional

policy consideration once minimum contacts have been established to ensure jurisdiction conforms with "traditional notions of fair play and substantial justice." Such an approach would be the " 'highly realistic' approach," *Burger King*, 471 U.S. at 479, that the Court has continually emphasized for determining jurisdiction. If the Court adopts the additional requirement, as Petitioner suggests, the effect is to limit the application of specific jurisdiction to such a small number of cases that the concept would be meaningless. In most cases this would eliminate tort litigation altogether. Respondents respectfully urge the Court to reject this new requirement and adhere to its existing approach to *in personam* jurisdiction.

B. Carnival's Contacts With Washington State Are Sufficient To Satisfy Minimum Contacts And These Contacts Are Related To The Respondents' Cause Of Action

Since the Court adopted the general and specific jurisdiction distinction, many lower courts have confused or incorrectly applied these approaches.[4] Consequently, some courts have adopted stricter nexus requirements between the contacts and cause of action than constitutionally required. But the issue here is not whether one state may adopt a higher standard, but rather, what is the constitutionally required minimum nexus. The circuits have adopted many tests for determining the minimum

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[4] Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988).

connection between the cause of action and the defendant's forum contacts. Some tests have been very restrictive and others have broadly defined the nexus. Only two circuits, the first and eighth, have adopted a restrictive approach to defining "arising from."[5] The Seventh Circuit has adopted a broad test, allowing jurisdiction when the plaintiff's claim "lies in the wake" of the defendant's forum contacts.[6] Similarly, the Fifth Circuit, the Sixth Circuit, and the Ninth Circuit have adopted the flexible "but for" test.[7] The Washington Supreme Court, in this case, has also adopted the "but for" test.

Though Petitioner is correct in alleging that "[T]he court below acknowledged that it would have found jurisdiction lacking if it had employed the standard adopted by some [two] other circuits," Pet. Brief 15, that is not the issue. The issue is whether the Fifth, Sixth, and Ninth Circuits' "but for" standard meets constitutional scrutiny. Respondents contend the "but for" standard is constitutional in light of this Court's specific jurisdiction cases.

The court below justified its adoption of the "but for" test in terms of equity to manufacturing defendants in product liability cases and fairness to the forum states. It

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[5] *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983)

[6] *Hutter Northern Trust v. Door County Chamber of Commerce*, 403 F.2d 481 (7th Cir.1968).

[7] *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir.1981); *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir.1988); *Cubbage v. Merchant*, 744 F.2d 665 (9th Cir.1984).

found that the "application of a 'but for' standard is more consistent with cases finding jurisdiction over manufacturers of defective goods sent into a forum state." Pet. App. 15a. In other words, such a test would treat the travel industry similarly to the manufacturing industry in product liability suits and end the travel industry's preferential treatment. In this case, Petitioner is, not merely selling transportation. The advertising and promotional literature sells a product; a complete vacation, including lodging, transportation, exotic meals and entertainment. Petitioner should not be treated in a different manner than a corporation which manufactures a product, places it in the stream of commerce and causes an injury.[8] Many courts have employed the flexible "economic activity" test in product liability cases to find a basis for jurisdiction over a nonresident manufacturer which shipped its products into the forum state.[9] The application of the "but for" test similarly should be used to confer jurisdiction over nonresident travel business that purposefully avail themselves of the residents of forum in order to sell their products.

Without the adoption of the "but for" test, the travel industry and other uniquely situated industries would be free to purposefully avail themselves of many forums without being subject to those forums' jurisdictions. The

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[8] See: Knudsen, *Jurisdiction Over the Travel Industry: A Proposal to End Its Preferential Treatment*, 1983 B.Y.U.L. Rev. 101 (1983).

[9] *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

current state of technology almost guarantees that the amount of interstate activity in this area of commerce will increase greatly in the future. The restrictive approach that Petitioner advocates would prevent states from establishing jurisdiction over these industries, thereby giving them preferential treatment. Such a result is contrary to this Court's previous decisions because it would defeat jurisdiction when the defendant, as in this case, purposefully directed his business at the forum state. "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. There is no compelling reason for granting the travel industry special treatment in this area.

The "but for" test also gives the forum states the ability to protect its citizens from injuries caused by nonresident defendants, who would escape jurisdiction without this test. "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 473 (quoting *McGee*, 355 U.S. at 223.) Further, this test is fair because it allows states jurisdiction over parties who purposefully direct their activities at forum residents and derive benefits from these activities. "[I]t may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King*, 471 U.S. at 474. This Court should preserve the right of

the states to protect its citizens by providing them a forum to recover compensation for their injuries.

C. The Ninth Circuit's "But For" Test Is A Realistic Approach To Specific Jurisdiction And Will Result In the Fair And Effective Resolution Of Jurisdiction Disputes

In adopting the "but for" test, the Ninth Circuit carefully followed this Court's precedents to ensure this test met the due process clause requirements. The court below compared this test with other tests and found that, while all tests met the due process requirements, the "but for" test is the most effective approach. Pet. App. 10a-17a.

In fact, the court below specifically found that this test protects the defendant's individual interest and would not be open-ended, as Petitioner alleges. "The 'but for test' is consistent with the basis function of the 'arising out of' requirement – it preserves the essential distinction between general and specific jurisdiction. Under this test, a defendant cannot be haled into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction." Pet. App. 16a. To argue that this test would result in open-ended jurisdiction over nonresident defendants shows a fundamental misunderstanding of the minimum contacts requirement and the "but for" test.

Petitioner's approach to the "but for" test appears to ignore that a court first must find the defendant had minimum contacts with the forum, in effect purposeful availment, before applying the "but for" test. The Court's

current approach to jurisdiction analysis has emphasized that due process does not require a defendant to be physically present in the forum when he has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). For specific jurisdiction purposes, this minimum contacts requirement has been interpreted to require the forum state to show that the defendant " 'purposefully directed' his activities at the residents of the forum." *Burger King*, 471 U.S. at 472, (quoting *Keeton*, 465 U.S. 770-774 (1984)).

Purposeful availment is a difficult standard for the plaintiff to establish. The defendant does not purposefully avail himself to a forum state when his contacts could "be characterized as random, isolated, or fortuitous." *Keeton*, 465 U.S. 770, 774 (1983). To the contrary, the forum court must find that "the contacts proximately result from actions by the defendant himself." *Burger King*, 471 U.S. at 475. The defendant is responsible only for contacts that he directly or indirectly caused through his purposeful activities. *World-Wide Volkswagen*, 444 U.S. at 295. Also important in this consideration is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *id.* at 297. This purposeful availment requirement itself meets the petitioner's concern about an open-ended test.

To further protect the defendant from unfair litigation in unrelated forums, a recent four Justice plurality

has cited conduct to be considered as evidence of purposeful availment. According to Justice O'Connor, examples of the defendant's intent to serve the forum state include "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi Metal Industry*, 480 U.S. at 112. Petitioner's conduct in the state exceeds these requirements.

Petitioner's brief also overlooks a fundamental rule in specific jurisdiction: "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. The rule is that a defendant who has purposefully availed himself to the forum state has the burden – a compelling case – to defeat jurisdiction.

In applying these principles to the present case, the courts below correctly found that the petitioner purposefully availed itself to the forum state. Carnival Cruise Lines is not making money from Washington residents by accident. The court below, in fact, found that the petitioner "advertised in the local media, promoted its cruises through brochures sent to travel agents in that state, and paid a commission on sales of cruises in that state. In addition, Carnival [Petitioner] conducted promotional seminars in Washington designed to increase its sales to residents of that state." Pet. App. 9a. The Washington Supreme Court agreed with this analysis. Petitioner's concerns about a test without limits are clearly

groundless given this Court's minimum contacts and purposeful availment emphasis, which the court below closely followed.

All of the Court's requirements for *in personam* jurisdiction require judicial interpretation to some degree, and are susceptible to Petitioner's "open ended" argument. Petitioner must present a compelling case to defeat jurisdiction since the court below found it purposefully availed itself at forum residents and the Court should reject Petitioner's argument that the adoption of a "but for" test would result in jurisdictional anarchy. The more likely result of the adoption of petitioner's argument is that non-resident defendants would often be immune from suit, regardless of their transactions of business in the forum state.

Finally, this Court has consistently stressed that the test for jurisdiction must be based on today's economic and technological realities. The travel industry is the paradigm of an industry that has been able to escape a forum's jurisdiction after purposefully availing itself to residents of a forum state. Such a result ignores the commercial and technological realities of the travel industry and is contrary to established precedent.

> It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. Rudzewicz, 471 U.S. at 476 (citing *Keeton*, at 774-75; *Calder v. Jones*, 465 U.S. 783, 788-89 (1984); *McGee*, 355 U.S. at 222-23).

The "but for" approach to specific jurisdiction does not result in an open-ended and unworkable test because it closely follows this Court's guidelines in prior cases. The adoption of the "but for" standard is consistent with this Court's holdings since *International Shoe* that jurisdictional analysis must be flexible and consider the changing national economy. Simultaneously, this test still protects the individual's liberty interests; no forum may obtain jurisdiction over a nonresident defendant who has not established minimum contacts with the forum through purposefully availing itself to the forum state. The "but for" test is the logical application of this Court's approach to jurisdiction in our modern society.

II. THE LOWER COURT CORRECTLY FOUND THE FORUM SELECTION CLAUSE INVALID SINCE THE CLAUSE VIOLATED THIS COURT'S HOLDING IN *THE BREMEN*

The most prominent case involving forum selection clauses is M/S *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"The Bremen"*). At least in the context of commercial towing contracts, that case controls the validity of the forum selection clauses. While it is questionable whether the same policy considerations should govern a contract for cruise ship passengers, the holding and reasoning of that case applies here to resolve this matter in Respondent's favor.

Contrary to Petitioner's allegations, the Ninth Circuit's holding is consistent with this Court's admiralty decisions and *The Bremen*. The court below found that the forum selection clause was unenforceable because it was not freely bargained for and because its enforcement would deprive the respondents of their day in court. Pet. App. 23a-24a. The Court in *The Bremen* did not intend that forum selection clauses should be used unfairly by one party to a contract, based on that parties overwhelming bargaining power. It intended the opposite result. The petitioner in this case, and Amicus Curiae, seek to have the cruise ship industry given preferential treatment. This is not only inconsistent with due process of law, it is inconsistent with the Court's holding in *The Bremen*.

A. The Forum Selection Clause Is Unenforceable Because It Was Not Freely Bargained For Between The Parties To The Contract.

Petitioner spends considerable time in its brief discussing whether the forum selection clause was incorporated in the ticket and that it was reasonably communicated to the respondents. These are not relevant issues in this case. The respondents do not contest the incorporation of the provisions nor that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated. The issue is whether the forum selection clause should be enforced, not whether Respondents received the ticket. Respondents contend that it should not be enforced because it is contrary to the Court's holding in *The Bremen*, it is against public policy to

enforce such contracts of adhesion and because it violates the provisions of 46 U.S.C. § 183c.

In *The Bremen*, the petitioner Unterweser, a German corporation, entered into a contract with respondent Zapata, an American corporation. The contract provided that any disputes would be brought before the London Court of Justice and required Unterweser to tow a Zapata oil rig to the Adriatic sea from Louisiana. When the oil rig was damaged in transit, Zapata brought suit in Federal Court in Florida and the Court upheld the forum selection clause. This is quite a different factual situation than the one presented in this case.

This Court, in *The Bremen*, held that forum selection clauses are prima facia valid. *The Bremen*, 407 U.S. at 10. The Court announced five instances in which such clauses would not be enforced: when one party can show its "enforcement would be unreasonable and unjust, or, that the clause was invalid for such reasons as fraud or overreaching" *Id.* at 15; its "enforcement would contravene a strong public policy of the forum in which the suit is brought" *Id.*; or when the party will be deprived of his day in court because the "forum will be so gravely difficult and inconvenient." *Id.* at 18. The Court also addressed the issues of public policy and statutory prohibition at 15 of the opinion:

> A contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

Following *The Bremen*, the lower court correctly found the forum selection clause unenforceable because "of the parties' disparity in bargaining power." Pet. App. 21a. The court based its decisions on many important differences between the negotiating positions of the parties in *The Bremen* and in the present case, most of which are obvious.

The parties in *The Bremen* were of similar bargaining position, unlike the parties in the present case. The parties in *The Bremen* were large, sophisticated corporations with experience in business negotiations; Zapata even made several changes in the contract after reviewing it. *Id.* at 3. Petitioner is a large corporation while Respondents are inexperienced and unsophisticated in business matters. The forum selection clause was part of Petitioner's standard contract that had not been negotiated or modified, unlike the contract in *The Bremen*, which had been negotiated and modified. As the lower court found, "the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis." Pet. App. 23a. The ticket contract also seems to prevent a refund for an unused ticket, thereby removing the passengers right to seek a refund if the clause were offensive. See: Paragraph 16(a) J.A. 15. In light of these vast differences between the parties' bargaining positions and the nature of the contract, the lower court correctly did not enforce the forum selection clause.

Other courts also have stressed the importance of the parties' relative bargaining position in deciding whether to enforce a forum selection clause. One court found no Fourth Circuit case had enforced the forum selection clause when the parties had "material differences" in

bargaining power. *Yoder v. Heinhold Commodities, Inc.*, 630 F.Supp. 756, 759 (E.D.Va. 1986). In enforcing a forum selection clause, one court found that both parties had sophisticated knowledge about the contract subject matter and had commercial experience. *Mercury Coal & Coke v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 318 (4th Cir.1982). Another court refused to enforce a forum selection clause for which the parties did not negotiate, finding that such a "take-it-or-leave-it clause will be disregarded." *Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir.1984). The parties in the present case are not of equal bargaining power. Neither was the contract freely negotiated; it was presented on a take-it-or-leave-it basis.

In a recent case in California, *Carnival Cruise Lines v. Superior Court*, 272 Cal. Rptr. 515 (1990), the California Court of Appeals refused to enforce such a clause. The Court discussed the manner in which the passengers were apprised of the forum selection clause in tickets identical to the one in this case.

> [T]he one plaintiff [out of 288] claiming awareness of the forum selection prior to departure did not have cancellation insurance. The tickets were subject to cancellation charges by Carnival. With respect to receipt of tickets, Silver [the affiant] stated: at least 44 of the plaintiffs received their tickets on actual embarking on the vessel on January 17, 1988. At least five plaintiffs received boarding passes only, no ticket at all. At least six plaintiffs received their ticket on the day of departure, four of whom received them two hours before embarkation, and at least four plaintiffs received the tickets the day before the cruise.

id. at 518.

Carnival made the same argument in that case as they do in this one. The clause gave Carnival more certainty and prevented them from being sued in the various forums in which they do business; and it was therefore reasonable. If Petitioner is relying on *The Bremen* to support its contract, its reliance is misplaced. The court did not intend that case to be a rubber stamp for all forum selection clauses, no matter how one sided the bargaining power or unreasonable the forum selected. The clause should be invalidated on these grounds alone and the circuit court's decision affirmed.

B. The Forum Selection Clause Was Unreasonable Because The Selected Forum Had Little Interest And Connection With The Controversy

Another issue is whether Petitioner's selection of Florida as a forum for all suits against it is reasonable under the circumstances. The answer is that it is an unreasonable and illogical forum under the facts of this case. None of the witnesses lived in or near Florida when this action was commenced. The majority of the lay and medical witnesses live in Washington. Petitioner mailed the Respondents' tickets to them in Washington. The ship in question left from southern California and called at ports on the west coast of Mexico before returning to California. The only connection to Florida is that Petitioner, a Panamanian corporation, now maintains its corporate headquarters there. While it might be possible to try a personal injury law suit in that state by deposition,

such a procedure would pose serious financial and tactical problems for the plaintiff in such an action. Indeed, Respondents submit that this inconvenience to potential plaintiffs is the principal reason for the clause.

Petitioner cites *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3rd Cir. 1988), as a case in which the issues are "essentially identical" to the issue in the current case. Pet. Brief 29. Petitioner is badly mistaken. The two cases could not be more dissimilar.

The *Hodes* court enforced the forum selection clause, finding the selected forum, Italy, was reasonable under the circumstances. But the circumstances showed that Italy had the most contacts with the controversy and the most interest in the outcome. The Italian-flag vessel's voyage began and ended in Italy. An Italian partnership also owned the ship at the time of the hijacking. *Id.* at 906. The ship's owners spent about ten percent of its advertising budget in the United States and Canada, but only 4.7% of the passengers were American on the voyage in question *Id.* at 907. The plaintiffs boarded in Italy and the cruise took place in the Mediterranean. In enforcing the forum selection clause, the court said that "[t]he choice of Italian venue for disputes arising out of a cruise on an Italian vessel, departing from and returning to Italy, was a sensible and fair choice." *Id.* at 913.

At the other extreme is the unreasonableness of Florida as the selected forum in the present case. As discussed above, all relevant contacts in this case are with states other than Florida. Florida's only connection with the suit is as the petitioner's principal place of business.

When compared to the reasoning and facts in *Hodes*, Florida is not the "sensible and fair choice" as a forum.

Other cases have followed the *Hodes* court's reasoning in deciding whether to enforce forum selection clauses. In enforcing the forum selection clause, one court said that Greece as the selected forum was reasonable given that the injury and cruise took place in Greece. The only persons not located in Greece were the plaintiffs and one of their physicians. *Hollander v. K-Lines Hellenic Cruises*, 670 F.Supp. 563, 566 (S.D.N.Y. 1987); *See also Walker v. Carnival Cruise Lines, Inc.*, 681 F.Supp. 470, 477-79 (N.D.Ill. 1987). (The court found reasonable the selection of Florida in the forum selection clause when the tort occurred in Florida and the voyage began and ended in Florida).

The lower court also found that enforcement of the forum selection clause would be so inconvenient to the respondents that it would deprive them of their day in court. One court was concerned that enforcement of the clause would deprive the plaintiff of his day in court when the selected forum's only contact with the suit was the defendant's principal place of business. "[W]here the clause requires the filing of a suit in a distant state it can serve as a large deterrent to the filing of suits by consumers against large corporations." *Yoder*, at 759. But courts have been less willing to consider the inconvenience of a party when the selected forum was a fair and logical choice. *Hodes*, at 916 (finding that Italy was not inconvenient considering Italy's strong connection to the action). In this case, the selection of Florida as a forum in the contract simply adds to the unreasonable nature of

the contract and reinforces the decision of the court below not to enforce such a clause.

C. The Ninth Court Correctly Applied Public Policy In Deciding Not To Enforce The Forum Selection Clause.

The petitioner is correct that two sections of the Limited Liability Act[10] apply to this case. 46 U.S.C. §183b prevents a carrier from reducing, by contract, the period to less than six months for a passenger to give notice of a claim or to reducing to less than one year the time in which to file suit. 46 U.S.C. §183c makes it unlawful for a shipping company to include in a ticket contract provisions "purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss, or injury, or the measure of damages therefore." Any contract provision that violates these statute is void.

The obvious purpose of this Act is to prevent the shipping line from taking advantage of its overwhelming bargaining power in their dealings with passengers. Petitioner alleges that these statutes allow forum selection clauses because they did not specifically prohibit them. Such a construction of a remedial statue is incorrect. The rule of statutory construction of remedial statutes is that they should be interpreted broadly to effectuate their purpose. *Peyton v. Rowe*, 391 U.S. 54 (1967); *Tchereprin v. Knight*, 389 U.S. 332 (1967); *Just v. Chambers*, 312 U.S. 383, 385 (1940). One statutory purpose of the Limited Liability

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[10] 46 U.S.C. § 181 et seq.

Act was "to afford an opportunity for the determination of claims against the vessel and its owner." *Just*, 312 U.S. at 385. While the application of the forum selection clause may not directly prevent this determination of claims, it does cause plaintiffs unreasonable hardship in protecting themselves. Moreover, one hardly can imagine how the enforcement of a forum selection clause would protect the plaintiff. Its effect, and probably its intent, is "to lessen, weaken, or avoid the right of any claimant to a trial," a result that this Act specifically prohibits. It plaintiffs, such as Respondents, are required to travel to distant, unrelated forums to pursue their claims, many will be unable to bring their actions and will therefore not be compensated for their injuries. This is precisely the result Congress intended to avoid.

There are numerous reasons why the forum selection clause should be held to be unenforceable, but its statute alone is sufficient. The Court should affirm the decision of the court below and allow this case to be pursued in the United States District Court for the Western District of Washington.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and this case should be remanded to the United States District Court for the Western District of Washington.

Respectfully Submitted

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